(24)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 414

UNION ELECTRIC COMPANY OF MISSOURI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner, Union Electric Company of Missouri, a corporation, prays that a writ of certiorari be issued to review the judgment (R. 1259) of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on August 9, 1943, in a cause entitled "Union Electric Company of Missouri, Appellant, *versus* United States of America, Appellee", designated in that Court as No. 12,268, Criminal.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, upon which its judgment was based, has not yet been reported but is set out in the record (R. 1231).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. § 347 (a)), subject to the rules promulgated by this Court on May 7, 1934, pursuant to the provisions of the Act of February 24, 1933, c. 119, as amended by the Act of March 8, 1934, c. 49, 48 Stat. 399 (18 U. S. C. 688).

The judgment of which review is sought was entered on August 9, 1943 (R. 1259) but did not become final until September 9, 1943, when petitioner's (appellant's) petition for rehearing was denied (R. 1295).

STATUTE INVOLVED

The statute involved is Title I of the Public Utility Act of 1935, entitled "An Act to Provide for Control and Regulation of Public Utility Holding Companies, and For Other Purposes", 49 Stat. 803 (15 U. S. C. § 79), hereinafter referred to as the Act.

Petitioner was convicted of conspiracy (Section 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88) to violate Section 12 (h) of the Act (15 U. S. C. § 79L (h)) and of seven violations of that Section, which is as follows:

> "(h) It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—
>
> (1) to make any contribution whatsoever in connection with the candidacy, nomination, election

or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

"The term 'contribution' as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution."

QUESTIONS PRESENTED

(1) Are the provisions of Section 12 (h) of the Act, prohibiting contributions, made otherwise than by use of the mails or any means or instrumentality of interstate commerce, in connection with a non-federal candidacy or to a political party or committee not engaged in promoting a federal candidacy, within the power of Congress, under Article I, Section 8, Clause 3 of the Constitution, to regulate commerce among the several states?

(2) If Section 12 (h) of the Act is constitutionally invalid as it stands, may any part of it be sustained as valid and separable from the remainder?

(3) Is the test, applied by the District Court and approved by the Circuit Court of Appeals, of petitioner's responsibility for the acts of certain of its officers in making the contributions in question erroneous as in conflict

(a) with applicable local decisions?

(b) with applicable decisions of this court?

STATEMENT

Petitioner is a corporation organized under the laws of Missouri (R. 234, 235, 238). It is engaged as a public utility corporation in the business of producing and distributing electricity in that State, and it owns the stock of subsidiary companies engaged in similar public utility operations in the State of Illinois and in a small part of the State of Iowa, as well as in areas in Missouri not directly served by petitioner (R. 950). It is engaged in interstate commerce, since it transmits electricity to Illinois and receives electricity from that State (R. 223, 224). It is a subsidiary company, as defined in Section 2 (a) (8) of the Act (15 U. S. C. § 79b (a) (8)), of The North American Company, a corporation of New Jersey, which is a "registered holding company" under Section 5 (a) of the Act (15 U. S. C. § 79e (a)).

The indictment in this case charges petitioner and its former president, Louis H. Egan, with participation in a criminal conspiracy to violate Section 12 (h) of the Act and, in separate counts, with seven violations of the provisions of that section (R. 16-31). The conspiracy described in the first count is a conspiracy to make, on behalf of petitioner and by use of the mails, means and instrumentalities of interstate commerce, and otherwise, contributions in connection with candidacies for both Federal and state offices and positions (R. 18-19). Each of the second to seventh counts, inclusive, charges the making, by use of the mails, of a contribution in connection with a candidacy for an office in Missouri (R. 23-30); and the eighth count charges the making, by use of an instrumentality of interstate commerce, of a contribution in connection with a candidacy for an office in the State of Illinois (R. 30-31).

After trial petitioner was found guilty by a jury upon each of the eight counts (R. 52-53) and judgment was rendered accordingly (R. 57-58). Its co-defendant, Egan, was

convicted only of the conspiracy charged in the first count of the indictment (R. 53).

Petitioner's appeal to the United States Circuit Court of Appeals for the Eighth Circuit was taken and prosecuted separately from the appeal of its co-defendant, Egan, but the appeals were presented on a joint record and were decided in one opinion (R. 1231) upon which separate judgments of affirmance were entered (R. 1259).

In the District Court petitioner demurred to the indictment, asserting that Section 12 (h) of the Act was constitutionally invalid upon the ground, among others, that it exceeded the powers of Congress and encroached upon the powers reserved to the states, in violation of Art. I of the Constitution and of the Tenth Amendment (R. 203). The constitutional objections, which the District Court overruled, were repeated in an objection to the taking of evidence (R. 212), in a motion for directed verdict (R. 922), and in motions after verdict (R. 1206, 1218). The adverse rulings of the District Court upon these objections were assigned as error upon the appeal (R. 168, 170, 171, 198).

The Circuit Court of Appeals held Section 12 (h) of the Act to be entirely valid as an exercise by the Congress of its power to regulate interstate commerce (R. 1234-1239). Therefore, it found it unnecessary to deal with petitioner's contention that no part of the Section might be sustained as separable from the remainder (R. 1234).

In addition to the questions raised by petitioner's constitutional objections to the statute are those which were presented below with reference to the test of petitioner's responsibility, as a corporation, for the acts of certain of its officers in making the political contributions in question.

The funds out of which those contributions were made had been obtained from petitioner upon false expense accounts and from persons who had obtained money from petitioner in payment of false bills (R. 511). The scheme

under which all of this was done was carried out under the direction of petitioner's executive vice-president, who received all of the funds except minor amounts; and the contributions from these funds were made either by him or by a subordinate officer at his direction (R. 895).

The evidence showed that the control and management of petitioner's business and property was in its Board of Directors, as provided in its by-laws (Art. II, Sec. 1—R. 928) and in the statutes of the State of Missouri,[1] in which petitioner was incorporated (R. 234, 235, 238), and that its officers had "such powers and duties as generally pertain to their respective offices, as well as such powers and duties as from time to time may be conferred by the Board of Directors or the Executive Committee" (By-laws, Art. III, Sec. 3—R. 930).

There was no evidence in the case that the Board of Directors or the Executive Committee had conferred upon any officer authority to make a political contribution.

The corporate charter of petitioner (R. 226-239) defines its powers and purposes (R. 229-233, 235-237). These do not include political activity of any sort; and a statute of the State of Missouri makes it unlawful for any corporation organized in that State to make a political contribution or, by any means, to attempt to influence the result of an election.[2]

In both of the courts below petitioner contended that the test of its responsibility for the acts of certain of its officers, in making, or conspiring to make, the contributions shown by the evidence, was whether those acts had been authorized, expressly or impliedly, by its Board of Directors. And it asserted that since there was no evidence that such acts had been expressly authorized by that Board, the minimum requirement was proof that a majority of its members, having prior actual knowledge of the fact that such acts were in contemplation, failed to object thereto.

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1 R. S. Mo., 1939, Section 5346, which was Section 4941 of R. S. Mo., 1929.
2 R. S. Mo., 1939, Section 11786 (R. S. Mo., 1929, Section 10478).

The trial court's charge to the jury upon this phase of the case is quoted in the opinion of the Circuit Court of Appeals (R. 1247-1248). The test of corporate responsibility which the trial court applied and the Circuit Court of Appeals approved is evidenced also by the refusal of petitioner's requested instructions numbered 3 (R. 1176), 3-A (R. 1177), 4-A (R. 1177), 5 (R. 1177-1178), and 6 (R. 1178).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that Section 12 (h) of the Act is valid as within the power of the Congress to regulate commerce among the several states;

(2) In holding that the trial court did not err in that portion of its charge to the jury quoted in petitioner's assignment of error numbered XXII (R. 194);

(3) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 4-A (R. 1177), quoted in petitioner's assignment of error numbered XIX (R. 192);

(4) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 5 (R. 1177), quoted in petitioner's assignment of error numbered XX (R. 192);

(5) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 6 (R. 1178), quoted in petitioner's assignment of error numbered XXI (R. 193);

(6) In holding that the trial court did not err in overruling petitioner's motion for a directed verdict in its favor (R. 919, 923, 1166), referred to in petitioner's assignment of error numbered IV (R. 171).

REASONS FOR GRANTING THE WRIT

(1) *The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.*

The primary question in this case is whether or not Section 12 (h) of the Act (28 U. S. C. § 79L (h)) is within the power of Congress to regulate interstate commerce. That section has not been passed upon by this Court. The Act of which it is a part is of major importance in recent Federal legislation. This Court has had occasion to deal with cases involving other parts of it.

In *Electric Bond and Share Company, et al. v. Securities and Exchange Commission, et al.*, 303 U. S. 419, the question was presented whether Sections 4 (a) and 5 of the Act, requiring registration as a condition of the right to engage in any of the activities there enumerated, were enforceable against the petitioners in that case, who asserted that the entire Act was unconstitutional. This Court held that Sections 4 (a) and 5 were valid and separable from other sections of the Act, so that they might be enforced independently of the provisions of other sections. In stating that conclusion the Court said:

> "It is evident that the provisions of §§ 4 (a) and 5 are not so interwoven with the other provisions of the Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter."
>
> (pp. 434-435, of 303 U. S.)

In *The North American Company v. Securities and Exchange Commission* (No. 721, October Term, 1942), now before this Court upon writ of certiorari, questions are involved as to the constitutionality of Section 11b (1) of the Act.

The questions as to the constitutionality of Section 12 (h) are apparent upon the face of it. It prohibits contributions in connection with state, as well as Federal, candidacies. It prohibits contributions to political parties or committees, without differentiation between parties or committees engaged in promoting Federal candidacies and those not so engaged. And its prohibitions apply to contributions made by use of the mails or any instrumentality of interstate commerce *or otherwise.*

By the terms of Section 12 (h), those prohibitions apply to every registered holding company and to every subsidiary company. In view of the definitions of those terms in Section 2 of the Act (15 U. S. C. § 79b), of the provisions for exemption in Sections 2 (a) and 3 (a) (15 U. S. C. § 79b, 79c), and of the kinds of activity requiring registration, as enumerated in Section 4 (15 U. S. C. § 79d), a company may be within the class to which Section 12 (h) is applicable although it engages in no interstate commerce.

The Congressional findings upon which the legislation was enacted and the broad purposes of it are stated in Section 1 of the Act. There is no mention in that Section of political contributions.

In view of all of these factors, it is submitted that the constitutional questions apparent upon the face of the statute are serious ones which should be settled by this Court.

(2) *The decision of the Court below is inconsistent with principles established by decisions of this Court.*

The conclusion reached by the Circuit Court of Appeals and certain of the premises upon which it is based do not give effect to the rule that intrastate activity is not within the reach of the Federal power unless it has a substantial effect upon interstate commerce or upon the regulation of such commerce.

United States v. Wrightwood Dairy Co., 315 U. S. 110

United States v. Darby, 312 U. S. 100

In such a case the question is whether "the particular activity" involved has such an effect (*U. S. v. Darby,* 312 U. S., at pp. 120-121).

The statute in question here applies to all registered holding companies and their subsidiaries, whether or not engaged in any interstate commerce; and it prohibits all contributions of the defined class, regardless of size. A contribution of $5 by a company with operating expenses of several millions of dollars per year is within the prohibition of the statute. The Circuit Court of Appeals disposed of that point upon the ground that, although the statute prohibits even trivial contributions, the sum of all such contributions may be far from trivial, citing in connection with that conclusion the decision of this Court in *Wickard v. Filburn,* 317 U. S. 111, 127-8.

The basis of the decision in that case was in the fact that wheat grown by different individuals becomes a part of the total supply overhanging the market and thereby affects the price of wheat moving in interstate commerce. But there is no comparable relationship between a political contribution made by one company and similar contributions made by other companies. The theory of the opinion of the Circuit Court of Appeals as to effect upon interstate commerce seems to be based upon the proposition that such contributions constitute lack of economy—that they are wasteful of the contributing company's assets (R. 1237-1238). If that be assumed, no relationship is demonstrated between contributions made by different companies. The assets of one company will not be affected by a contribution made by another. Moreover, a wasteful contribution by a particular company will not affect interstate commerce if that company does not engage in such commerce.

It is said in the opinion of the Circuit Court of Appeals:

> "If such contributions are considered as costs of operation, or if they are disguised upon the books of the

utility company as operating costs, they will affect rates."

(R. 1236)

Clearly political contributions may not be considered costs of operation. The fact that they may be disguised on the books of the Company as operating costs does not, it is submitted, show any legislative power to prohibit the contributions themselves. Any expenditure may be falsely entered on the books as an operating cost and, if the fraud be undetected, will have an effect on rates. If Congress had the power upon that ground to prohibit the expenditures themselves, its control over intrastate activities of utility companies incorporated in the several states would be practically without limit.

Again, if a contribution, regardless of size, might have an effect upon the rates at which electricity is sold, that fact would not demonstrate the necessary relationship to interstate commerce unless the statutory prohibition were confined to companies engaged in such commerce.

The opinion cites the fact that petitioner is engaged in interstate commerce and therefore subject to the control of Congress (R. 1237). That fact, however, is immaterial. What is being tested is the statute itself (*James v. Bowman*, 190 U. S. 127, *United States v. Reese*, 92 U. S. 214), and it is not confined to companies engaged in interstate commerce. If it were so confined, the contributions which it prohibits would not thereby be shown to be within the reach of the Federal power. The power of the Congress would not extend to intrastate activity of such companies, unless there were reasonable basis for the conclusion that the activity in question substantially affected the interstate commerce with which the Congress has power to deal.

It is submitted that the decision of the Circuit Court of Appeals is not consistent with these limitations, as settled by decisions of this Court.

(3) *The test of petitioner's responsibility for the acts of certain of its officers in making the contributions, as applied by the District Court and approved by the Circuit Court of Appeals, is erroneous.*

The question was whether or not petitioner's officers who made the contributions in question acted within the scope of their authority.

If, as petitioner contended below, the question whether its officers had the required authority to make the contributions is determinable by the local law, the trial court's charge to the jury was erroneous because in conflict with applicable local decisions. If the matter involved presents a federal question the charge was erroneous because in conflict with applicable decisions of this Court.

The test of agency under Missouri law.

1) As pointed out in the Statement, under the by-laws of the corporation its officers had "such powers and duties as generally pertain to their respective offices, as well as such powers and duties as from time to time may be conferred by the Board of Directors or the Executive Committee" (Art. III, Section 3—R. 930); and there was no evidence in the case that the Board of Directors or the Executive Committee had authorized any officer of the corporation to make a political contribution.

2) The corporate charter of petitioner, defining its corporate powers and purposes (R. 229-233, 235-237), does not authorize political contributions or political activity of any sort; and under an applicable statute of the State of Missouri it is unlawful for any corporation incorporated in that state to make such contributions (R. S. Missouri, **1939**, § 11786, R. S. Missouri, **1929**, § 10478).

The general authority of an officer does not extend to a subject matter outside the business of the corporation and in excess of its corporate powers.

National City Bank of St. Louis v. Carleton Dry Goods Co., 334 Mo. 339, 67 S. W. (2d) 69, 73.

The control and management of petitioner's business and property were vested in its Board of Directors, as provided in its by-laws (Art. II, Sec. 1—R. 928) and in the Missouri statute (R. S. Missouri, **1939**, § 5346, R. S. Missouri, **1929**, § 4941). Under Missouri decisions the act of an officer of a corporation beyond his office is not the act of the corporation unless it has been expressly or impliedly authorized by the Board of Directors; and such authorization may not be implied unless at least a majority of the Board had prior actual knowledge of the proposed ultra vires act and failed to object to it.

Grafeman Dairy Co. v. Northwestern Bank, 315 Mo. 849, 288 S. W. 359;
Grafeman Dairy Co. v. Northwestern Bank, 290 Mo. 311, 235 S. W. 435 at p. 441;
Hyde v. Larkin, 35 Mo. App. 365.

The trial court refused petitioner's requests to instruct the jury to that effect (R. 1177—requested instructions numbered 4-A and 5).

The charge it gave, as set out in the opinion of the Circuit Court of Appeals (R. 1247-1248), required the jury to find petitioner guilty if the persons who made the contributions were acting "as officers" (without definition of the authority of officers or requirement of actual authorization), although the acts in question were beyond corporate powers (R. 1248).

The test of agency under decisions of this Court

The opinion of the Circuit Court of Appeals cites the following decisions of this Court:

> *Washington Gas Light Co. v. Lansden,* 172 U. S. 534;
> *New York Central & H. R. R. v. United States,* 212 U. S. 481.

In each of those cases the test stated is whether or not the *subject matter* of the act in question is within the scope of the authority of the officer or employee. In the Washington Gas Light Company case it was held that the corporation was not responsible for the action of its officer in criticizing testimony, given before a Congressional Committee, as to the cost of producing gas, because the subject matter of his act was not within the scope of his duties. In the New York Central & H. R. R. case a corporation was held liable for the act of its officer in favoring certain shippers by a rate which was less than the published rate, in violation of a federal statute. This was upon the ground that "the subject matter of making and fixing rates was within the scope of the authority and employment of the agents of the company" (212 U. S. 481 at p. 494).

In this case the making of political contributions constitutes the subject matter of the acts in question. Officers of petitioner had no authority, merely by virtue of their offices, to make such contributions, because that kind of an act was beyond the corporation's powers under its charter and the local statute. Unless they acted upon the express or implied authorization of the Board of Directors, which was vested with the "control and management" of the business and property of the corporation, they were not acting by authority of the corporation.

The test applied by the trial court and approved by the Circuit Court of Appeals, as expressed in the instruction

which is set out in the opinion (R. 1247-1248), is inconsistent with the decisions of this Court in the two cases cited, as well as with Missouri law.

CONCLUSION

In view of the important federal question presented and of the other questions referred to the case is an appropriate one for review by this Court.

Respectfully submitted,

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